IN THE SUPREME COURT OF FLORIDA

ALFONSO GREEN, :

Appellant, :

vs. : Case No. SC02-2315

STATE OF FLORIDA, :

Appellee. :

_____:

APPEAL FROM THE CIRCUIT COURT
IN AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
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TENTH JUDICIAL CIRCUIT

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TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS

PRELIMINARY STATEMENT

Appellant will rely upon his initial brief in reply to Appellee’s arguments as to Issues I and IV.

STATEMENT OF THE CASE AND FACTS

On page 3 of its brief, line 15, Appellee begins a sentence: "Nichols confronted him…" This should be: " [Detective] Noblitt confronted him…"

On pages 12-17 of its brief, Appellee quotes the trial court's findings in aggravation. With regard to the court's finding that Appellant was previously convicted of another capital felony or felony involving violence, which is quoted on page 13, the court erroneously wrote that Appellant was convicted in 1993 of assault with intent to commit rape; this conviction actually was much more remote in time, having occurred in 1975. (State's Exhibit #31.)[1]

[1] The clerk's office recently furnished counsel with a volume containing copies of exhibits, and the exhibit in question appears in this volume at pages 169-171).

ARGUMENT

ISSUE II

APPELLANT SHOULD HAVE HIS DEATH SENTENCES VACATED IN FAVOR OF LIFE SENTENCES BECAUSE THE COURT THAT ORIGINALLY SENTENCED HIM TO DEATH FAILED TO FILE A TIMELY WRITTEN ORDER SETTING FORTH HIS FINDINGS IN SUPPORT OF THE DEATH SENTENCES IMPOSED.

On page 30 of its brief, in footnote 6, Appellee states that Appellant's Third Amended Motion to Vacate has not been included in the instant record on appeal. Actually, this motion is in the record; the Court can read it in volume 7 at pages 1304-1392.

Appellant urges this Court to review the very brief sentencing hearing that took place on October 23, 1987. It can be found in Volume XII of the original record on appeal at pages 2209-2219.[2] The trial court engaged in no analysis of the aggravating and mitigating circumstances at the hearing. After hearing from counsel and Appellant, the court said (Volume XII of original record on appeal, pages 2217-2219):

> Mr. Green, you are now present with counsel. The record should reflect that. There's no legal cause as to why the judgement and sentence of the court should not be pronounced. At this time, you are found guilty of the crime of the offense of first degree murder by a jury of 12 of your peers and thereafter the jury would render an advisory sentence to the Court, as you know,

[2] The case number for Green's original appeal in this Court was 71,540.

> an advisory sentence of the death vote of 12 to 0.
>
> The Court has considered the aggravating and mitigating circumstances presented in the evidence in this case, both of the trial phase and the penalty phase and the Court determines at this time there are sufficient aggravating circumstances and there are insufficient mitigating circumstances to outweigh the aggravating circumstances.
>
> There being no legal cause why the judgement and sentence of the law should not be pronounced the Court adjudges at this time that you are guilty of the crime of murder in the first degree and it is the sentence of the Court that you be taken into custody of the Florida Department of Corrections and that at an appointed place in time you be put to death. May God have mercy on your soul. You have an automatic appeal to the Florida Supreme Court and the judgment of the guilty sentence of the Court as just imposed. A written order, as required by Florida Law will be forthcoming over the next say, 20 days. Is there anything further? Thank you.
>
> That is a sentence as to each count adjudicated guilty of both counts and then the sentence as to each count.

As one can see, the judge who originally sentenced Appellant to death made no oral findings regarding what aggravating and mitigating circumstances he considered, or which he actually found to exist. With no sufficient findings, and no contemporaneous written sentencing order, one cannot be assured that the trial court engaged in "a well-reasoned application of the factors set

out in [Florida's capital sentencing statute]," Van Royal v. State, 497 So. 2d 625, 628(Fla. 1986), prior to imposing the ultimate sanction. The court's conclusory statements regarding aggravators and mitigators do not serve to show that he engaged in a meaningful analysis and balancing of the factors involved in this cause, leading to a lack of confidence in the reliability of the sentencing outcome. Appellant's case thus is readily distinguishable from Stewart v. State, 549 So. 2d 171 (Fla. 1989), which Appellee cites on page 31 of its brief. In Stewart this Court noted that, although the trial court had not filed a written order detailing his reasons for imposing a sentence of death, he had made "detailed oral findings." 549 So. 2d at 176. Such findings are lacking from the original sentencing proceedings herein.

To the extent Appellee argues that Appellant's claim is procedurally barred because it was not raised in his previous appeal and was allegedly abandoned in post-conviction proceedings after being initially raised therein, this Court should perhaps consider whether Appellant's former appellate counsel and/or post-conviction counsel rendered ineffective assistance in failing to pursue the issue.

ISSUE III

THE COURT BELOW ERRED IN FINDING THE BURGLARY AND PECUNIARY GAIN AGGRAVATING CIRCUMSTANCES AND SUBMITTING THEM TO THE JURY, AS THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THEM, AND THE JURY INSTRUCTION ON BURGLARY WAS INCOMPLETE AND INCORRECTLY STATED THE LAW.

Appellee argues that this Court should reject Appellant's argument predicated upon Delgado v. State, 776 So. 2d 233 (Fla. 2000) for two reasons: lack of preservation and non-retroactivity. With regard to preservation, the Second District Court of Appeal recently decided Smith v. State, 867 So. 2d 617 (Fla. 2004) and agreed with the appellant that a Delgado error such as that raised in the instant appeal constituted fundamental error:

> Smith argues that the trial court committed fundamental error by instructing the jury that burglary could be committed by "remaining in" a structure, contrary to the rule announced in *Delgado v. State*, 776 So.2d 233 (Fla.2000), in which the supreme court held that "the 'remaining in' language applies only in situations where the remaining in was done surreptitiously." 776 So.2d at 240. We agree. There was no evidence presented in Smith's trial that would support a "surreptitious remaining."

867 So. 2d at 617-618. The Smith decision was in line with this Court's opinion in Reed v. State, 837 So. 2d 366 (Fla. 2002), holding that the giving of a standard jury instruction which

inaccurately defined an essential disputed element of the offense constituted fundamental error.

Additionally, any lack of preservation could constitute ineffective assistance of trial counsel on the face of the record, although, as discussed above, this Court should not need to reach this issue because of the fundamental nature of the error in the way Appellant's penalty jury was instructed on burglary.

As for Appellee's other argument, given the posture of this case, it is too simplistic to say that Delgado does not apply because that decision is not retroactive. At Appellant's new penalty trial, the burglary issue was reopened when the State sought to use as an aggravating circumstance the alleged fact that the homicides were committed during the course of a burglary. Obviously, it then became necessary for the jury to be given a proper and correct instruction that accurately defined the necessary elements of burglary, not the discredited, pre-Delgado definition that was employed by the court below.

CONCLUSION

Based upon the foregoing facts, arguments, and citations of authority, your Appellant, Alfonso Green, renews his prayer for the relief requested in his initial brief.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert J. Landry, Concourse Center #4, 3507 E. Frontage Rd. - Suite 200, Tampa, FL 33607, (813) 287-7900, on this 25th day of , .

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully submitted,

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